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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j) of the)
Communications Act -- Competitive Bidding)
for Commercial Broadcast and Instructional)
Television Fixed Service Licenses)

MM Docket No. 97-234

Reexamination of the Policy Statement on)
Comparative Broadcast Hearings)

GC Docket No. 92-52

Proposals to Reform the Commission's)
Comparative Hearing Process to)
Expedite the Resolution of Cases)

GEN Docket No. 90-264

**COMMENTS OF COX RADIO, INC.
ON THE
NOTICE OF PROPOSED RULEMAKING**

Cox Radio, Inc. ("Cox") by its attorneys files these comments in response to the Notice of Proposed Rulemaking, FCC 97-397, released November 26, 1997 concerning implementation of section 309(j) of the Communications Act ("NPRM").

I. Treatment of Applications for Major Changes to Existing Facilities

Cox objects to the use of auctions for mutually exclusive applications for major changes to existing broadcast facilities. A decision to use auctions generally for modifications is not in accord with the intent of Congress in expanding the use of competitive bidding procedures. In the Balanced Budget Act of 1997, Congress has neither mandated the use of

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auctions for modification applications (whether for major or minor changes), nor explicitly authorized discretionary use of auctions for such applications. Indeed, as the Commission itself recognizes, "the operative statutory language [of section 309(j)] was not modified by the Balanced Budget Act."^{1/} Rather, Congress retained use of the word "initial" in amended section 309(j), and moreover, also used the word "initial" in new section 309(l), to describe the kinds of licenses and construction permits encompassed by auction authority.^{2/} In the accompanying Conference Report,^{3/} Congress did not even hint at a desire to use competitive bidding procedures for those applications covering changes to existing broadcast facilities. The Commission should not interpret the legislation in an overly broad manner to institute the use of auctions generally for such applications, especially when so doing will result in unnecessary burdens and delays for licensees.^{4/}

^{1/} NPRM, ¶ 47.

^{2/} See Balanced Budget Act of 1997 § 3002(a)(1)(A) (mandating the use of competitive bidding if "mutually exclusive applications are accepted for any initial license or construction permit" (emphasis added)) (to be codified at 47 U.S.C. § 309(j)(1)), and § 3002(a)(3) (adding new section 309(l) regarding the applicability of competitive bidding to pending comparative licensing cases with respect to "competing applications for initial licenses or construction permits" for commercial radio or television stations that were filed . . . before July 1, 1997) (emphasis added) (to be codified at 47 U.S.C. §309(l)).

^{3/} See H. Rep. No. 105-217, at 570-582 (Title III - Communications and Spectrum Allocation Provisions).

^{4/} Notably, in its Second Report and Order implementing section 309(j) in 1994, based on Congressional intent to address "initial" licenses and construction permits, the Commission declined to adopt a general rule subjecting modification applications to competitive bidding. Second Report and Order (Implementation of Section 309(j) of the Communications Act -- Competitive Bidding), 9 FCC Rcd 2348, ¶¶ 37-38 (1994). The Commission stated that, in the modification context, it would consider the use of auctions only where competing major
(continued...)

At the same time, Cox does not believe that the use of comparative hearings to resolve competing applications for major modifications is a realistic option. Given the courts' rejection of previously used comparative hearing criteria,^{4/} it seems a futile exercise to try to develop new comparative criteria that will withstand judicial scrutiny and prove workable, at least for the foreseeable future. The time involved in trying to develop such criteria, not to mention the time involved in implementing them, would obviously create excessive delays in resolving pending applications as well as those filed in the near future. Such an approach makes no sense and undermines one of the main purposes behind the NPRM: namely, arriving at methods to process mutually exclusive broadcast applications expeditiously.

In the event that the Commission does choose generally to use auctions to resolve mutually exclusive applications for major changes to existing facilities, Cox urges the Commission first to afford affected parties an opportunity to attempt good-faith negotiations among themselves to address the mutual exclusivity problem. Parties are not always aware that a pending major change application is mutually exclusive with one or more applications filed by other licensees. Once applicants become aware of the problem, however, often there are technical or engineering solutions that the affected licensees can devise, and if the proposed solutions comport with Commission rules and the public interest, the Commission should welcome them.

^{4/} (...continued)

change applications are "in substance more akin to initial applications" because the "modification would be so major as to dwarf the licensee's currently authorized facilities . . ."). Id. (emphasis added).

^{5/} See Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) (Bechtel II).

This approach would require that the Commission first accept normal major modification applications for a designated period of time and then review them to determine any mutual exclusivity problems. The parties notified by the Commission of conflicting applications would then need a reasonable period of time to attempt a negotiated solution, prior to the opening of any "auction window." So long as parties have not yet filed short-form applications for competitive bidding, the parties should be able to negotiate among themselves without fear of violating the anti-collusion rules. The Commission could set a deadline by which the parties would need to notify the Commission that a solution had been agreed upon and amend their respective applications accordingly. These applications could then be processed in the ordinary course as non-competing. Only those parties who could not resolve conflicts through negotiations would then face competitive bidding procedures as a last resort.

Cox further suggests that, if the Commission chooses to auction mutually exclusive major change applications, the Commission should adopt a liberal waiver policy that would take into account public interest considerations as well as equitable considerations for the applicant. For example, where a pending modification application proposes multiple actions, such as an increase in power and a rebuilding of a deteriorating facility (the latter being a minor change under the Commission's current definitions), the Commission should waive its multiple applications rule, 47 C.F.R. § 73.3520, to permit the applicant to file a separate application for the minor change. The new application for the rebuild should then be acted upon by the Commission expeditiously, based on any requisite engineering data, a showing that the proposed

change is in compliance with Commission rules, etc.^{6/} Yet, currently applications proposing such physical improvements in combination with major changes are caught in the Commission's "freeze" on applications for major modifications.

It is neither in the applicant's nor the public's interest to have commercial broadcast facilities that, because of deteriorating physical condition, provide inadequate service to the community. On the contrary, the Commission should recognize the broad public interest benefits of having licensees rebuild facilities that either presently provide or threaten less than optimal service, and should reward the licensee willing to invest the capital in making such physical improvements. Maintaining the freeze on such applications only allows facilities to deteriorate further, not only delaying the remedy, but also potentially increasing the amount of capital that will be necessary to remedy the deterioration. In light of the public interest and equitable considerations presented, a waiver of section 73.3520 in this scenario should be virtually *pro forma*.

A liberal waiver policy should also be implemented for major change applications that would, if granted, increase significantly the number of persons to be served by an existing facility in a particular market. The public interest in providing additional service to a substantial

^{6/} As discussed below in Section II, Cox believes the Commission should in no event use competitive bidding procedures to resolve minor change applications.

segment of a market's population should weigh heavily in favor of granting the applications, assuming the proposed change otherwise complies with Commission rules.^{2/}

II. Treatment of Applications for Minor Changes to Existing Facilities

Cox objects to the use of auctions for minor modification applications under any circumstances. The Commission states in the NPRM that only in rare instances do minor modification applications present the problem of mutual exclusivity. The instances may increase in number as full-service radio stations are forced to relocate because of the transition to DTV (*i.e.*, television stations may need to bump radio licensees from a particular location to enable the television station to provide DTV service as required). Consequently, radio licensees will need to file applications for minor modification to obtain authorization for their relocations. However, a dilemma potentially arises in this "DTV relocation" scenario insofar as two or more "involuntary" relocation requests may become mutually exclusive, as, for example, where the parties' respective relocation requests present a short-spacing problem.

Participation in a competitive bidding procedure means a substantial additional burden for licensees in terms of both time and expense which may be disproportionate to the modification itself. It would be unfair to require licensees to incur these burdens, especially

^{2/} The Commission might also use this opportunity to consider whether a change in the definition of "major" change for AM radio facilities is advisable in order to narrow substantially the types of mutually exclusive AM radio modification applications that could become subject to auctions, in the event the Commission opts to use them for major changes to existing facilities. (Under current definitions applicable to television and FM radio, very few applications covering existing television and FM radio facilities would ever become mutually exclusive major change applications.)

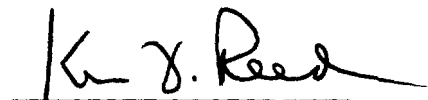
where the request for minor modification is essentially involuntary. As a general matter, the Commission should continue to allow applicants to file their minor change applications at any time, and the Commission should simply process each application on its own merits, implementing a liberal waiver policy with respect to rules such as that governing short-spaced stations, and taking into account public interest concerns including continued radio broadcast service.

As noted above, in neither the Balanced Budget Act of 1997 nor the accompanying Conference Report is there evidence that Congress intended or desired to extract revenues from broadcast licensees through competitive bidding for changes to existing facilities.^{8/} Cox urges the Commission not to expand the scope of the legislation by including minor modification applications in the auctions process.

Respectfully submitted,

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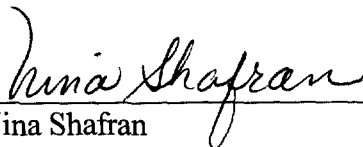
^{8/} See supra notes 2 and 3 and accompanying text.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments of Cox Radio, Inc. on the Notice of Proposed Rulemaking," was sent via hand delivery on this 26th day of January, 1998, to the following:

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